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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ANDREW CULLEN,

Plaintiff and Respondent,

v.

COUNTY OF RIVERSIDE et al.,

Defendants and Appellants.

E070636

(Super.Ct.No. RIC1708630)

OPINION

APPEAL from the Superior Court of Riverside County. Sunshine S. Sykes, Judge.
Affirmed.

Gregory P. Priamos, County Counsel, James E. Brown and Bruce G. Fordon,
Deputy County Counsel, for Defendants and Appellants.

Messing Adam & Jasmine, Lina Balciunas Cockrell and Gary M. Messing for
Plaintiff and Respondent.

Plaintiffs and appellants County of Riverside (County) appeal the order entered by
the superior court awarding defendant and respondent Andrew Cullen attorneys' fees
pursuant to Code of Civil Procedure section 1021.5.

Cullen was an Emergency Medical Technician (EMT) employed by the County of Riverside. He got a DUI and the County sought to revoke Cullen's EMT certification. He was given probation rather than having his certification revoked. He failed to comply with the terms of his probation and a revocation hearing was scheduled before an administrative law judge (ALJ) employed by the office of administrative hearings (OAH). At that hearing, Cullen sought to have his non-attorney union representative appear on his behalf but the ALJ ruled that the non-attorney could not represent him at the hearing. His EMT certification was revoked. Cullen filed a verified petition for writ of administrative mandamus in Riverside County Superior Court case No. RIC 1708630 (Writ). On October 19, 2017, the superior court concluded that Cullen was not afforded a fair hearing because he was denied his representative of choice. It ordered that Cullen be afforded a new hearing with the representative of his choice.

The County did not appeal the grant of the Writ. Cullen sought his attorneys' fees and costs pursuant to Code of Civil Procedure section 1021.5 and was awarded \$30,762.50.

The County argues on appeal that (1) the OAH was an indispensable party that should be joined in the case or it would not be bound by the superior court's ruling, thereby foreclosing any significant benefit to the public at large; and (2) an EMT at a State disciplinary hearing conducted by an ALJ employed by the OAH is not entitled to representation by a non-lawyer.

FACTUAL AND PROCEDURAL HISTORY

Cullen was an EMT employed by the California Department of Forestry and Fire Protection assigned to the Riverside ranger unit. He was certified as an EMT on January 3, 2000, by the Riverside Emergency Medical Services Agency (REMSA), which was an administrative agency of the County.

In March 2012, Cullen was convicted of driving under the influence and was placed on probation for three years. In October 2014, REMSA issued a disciplinary order seeking to revoke Cullen's EMT certification. In November 2014, a deal was worked out wherein Cullen would keep his EMT certification but would be placed on probation. In June 2016, REMSA issued a petition to terminate probation and revoke certification alleging Cullen was not complying with the terms of his probation. The matter was set for a contested hearing in front of an ALJ employed by the OAH. Cullen gave notice that he intended to have Peter Boctor—who was employed by CALFIRE as an engineer, and was a union representative—represent him at the hearing. Boctor was not an attorney.

The hearing was conducted in front of an ALJ of the OAH. Boctor appeared at the hearing and asked to represent Cullen. The ALJ denied the request citing to the Administrative Procedure Act of Government Code sections 11340 et. Seq. (APA).¹ The ALJ refused a continuance in order for Cullen to obtain counsel. Cullen was forced to

¹ The APA comprises chapter 3.5 (commencing with section 11340), chapter 4 (commencing with section 11370), chapter 4.5 (commencing with section 11400) and chapter 5 (commencing with section 11150) of Part 1 of Division 3 of Title 2 of the Government Code. This appeal concerns chapter 5.

represent himself. Boctor was allowed to stay with Cullen during the hearing. Cullen objected on the record that he was not allowed to have his chosen representation.

The ALJ issued a proposed decision to revoke Cullen's EMT certification. In a footnote, the ALJ cited to *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 68-69 as authority for the proposition that representing parties in state administrative hearings was the practice of law. Further, Cullen provided no authority that a non-lawyer could represent him in a REMSA or OAH proceeding. On March 13, 2017, REMSA adopted the ALJ's proposed decision and revoked Cullen's EMT certification effective April 12, 2017.

Cullen filed the Writ pursuant to Code of Civil Procedure section 1094.5. Cullen argued that a peremptory writ should issue because revocation of his certification was excessive and he was not afforded due process during the hearing because he was denied representation of his choosing. Cullen was entitled to a new hearing. Cullen referred to Government Code section 11509 in the APA which sets forth the requirements for the hearing. That section provided no authority as to how the hearing was to be conducted. The decision by the ALJ not to allow Boctor to appear was not supported by the APA or case law. Cullen referred to other sections of the APA, e.g. Government Code sections 11455.30, subdivision (a), and 11520, subdivision (b), which used the terms "attorneys and other authorized representatives." His due process rights to a fair hearing were violated. He was prejudiced as he inadequately represented himself.

The County filed opposition. The County argued that the hearing rules were not only subject to the APA but also to the rules of the OAH, which were not provided.

Further, the ALJ allowed Boctor to stay at the hearing. Substantial evidence supported the ALJ's decision.

Cullen filed a reply. He criticized the County for failing to provide any authority expressly prohibiting Cullen from being represented by a non-attorney representative at the hearing. Although the County argued that the APA must be read along with agency specific statutes, no citations were provided. Cullen referred to *Davis Test Only Smog Testing v. Department of Consumer Affairs* (2017) 15 Cal.App.5th 1009, 1015-1016, which limited *Benninghoff* to cases involving defrocked lawyers and found that no rules barred a non-attorney from appearing on behalf of another at an administrative hearing.

The County requested that the superior court take judicial notice of California Attorney General Opinion No. 14-101 published in September 2017. It provided that the APA does not by *itself* authorize a party to a proceeding conducted by the OAH to be represented by a person who is not an active member of the California State Bar. The Opinion recognized that case law and agency statutes may allow for representation by a lay person. Further, it noted that Government Code section 11509, which set out the guidelines for giving notice of a hearing, mentioned only self-representation and attorney representation.

The superior court issued a tentative ruling on October 19, 2017. It noted pursuant to Code of Civil Procedure section 1094.5, subdivision (a) it had the authority to inquire into the validity of any final administrative order. It addressed whether Cullen had received a fair trial. Cullen was a certified EMT under the Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act (the EMS Act) codified

at Health and Safety Code sections 1797, et seq. Cullen was entitled to a hearing in front of an ALJ in accordance with the APA. The superior court stated, “The APA, the EMS act and the FBOR [Firefighters Procedural Bill of Rights Act] are all silent on the issue of whether a party is entitled to be represented by a layperson at the administrative hearing and there is no case law or other authority directly on point.” It concluded that administrative hearings were informal and nothing foreclosed representation by a non-lawyer. Further, it noted several provisions in the APA, which referenced “attorney or other authorized party.” It rejected that Government Code section 11509 specifically excluded a non-lawyer representative. Further, the County had failed to refer to any agency-specific statutes that altered the APA directives. It concluded that Cullen had the right to be represented by a non-attorney representative and that he did not receive a fair trial.

The Writ was heard on October 20, 2017. The superior court adopted its tentative ruling. The superior court directed REMSA to “conduct a new hearing in accordance with the procedures set forth in the [APA] and to allow Petitioner to be represented by a representative of his choice.”

On January 16, 2018, Cullen filed his notice of motion and motion for recovery of attorneys’ fees (Motion) pursuant to Code of Civil Procedure section 1021.5. Cullen requested \$52,740 in attorneys’ fees, which included a lodestar multiplier of 1.5. Cullen argued that he was the successful party in the Writ proceedings. Such determination vindicated an important constitutional right to due process and a fair trial. Further, although not a published Court of Appeal decision, the superior court ruling had

implications beyond Cullen's case conferring a significant benefit upon the general public. The decision clarified an ambiguous principle of law.

Further, Cullen argued that the OAH was REMSA's designee with respect to the hearing procedure and it could reject the findings of the ALJ. Cullen argued that REMSA could direct the OAH to hold another fair hearing. The OAH had no interest in the decision to revoke Cullen's EMT license; it was only tasked with providing a fair hearing. The ruling would deter REMSA in future hearings from allowing such proceedings to continue when a party asked to be represented by a non-lawyer representative and was rejected by the ALJ. Cullen argued the amount of attorneys' fees was reasonable.

The County opposed the Motion. The County argued that Cullen did not vindicate an important right. The County argued that it did not have the authority to establish the procedural rules of the hearing in front of the OAH. Even if it had rejected the findings of the ALJ, it could not order a new hearing in the OAH wherein Cullen could be represented by the person of his choosing. Further, Cullen's purpose in filing the action was to further only his personal interests. The County further argued that the lodestar multiplier was not justified.

Cullen filed a reply. He insisted that the important right vindicated by him in the litigation was the right to due process prior to a governmental taking. Further, the right had a significant benefit to all public employees who were subject to the APA rules.

The superior court issued a tentative ruling that the litigation conferred a significant benefit on other EMTs facing disciplinary proceedings. Cullen incurred a

significant expense in litigation. The superior court refused to apply the multiplier. A short hearing on the Motion was conducted on April 4, 2018. The County argued that it should not bear the costs of the mistake by the ALJ, who was employed by the OAH. Cullen's attorney responded that the County could have rejected the ALJ's decision when it was aware of the unfairness of the proceeding. The trial court stated, "After hearing further argument, I'll remain with my tentative decision, and that will be the final order of the court." The judgment awarding Cullen \$30,762.50. in attorneys' fees was entered on May 10, 2018,

DISCUSSION

A. CODE OF CIVIL PROCEDURE SECTION 1021.5

"The award of attorney fees is proper under [Code of Civil Procedure] section 1021.5 if '(1) plaintiffs' action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons" and (3) "the necessity and financial burden of private enforcement are such as to make the award appropriate." ' ' ' (Press v. Lucky Stores, Inc. (1983) 34 Cal.3d 311, 317-318, fn. omitted.)

"The strength or societal importance of a particular right generally is determined by realistically assessing the significance of that right in terms of its relationship to the achievement of fundamental legislative goals." (Robinson v. City of Chowchilla (2011) 202 Cal.App.4th 382, 393-394.) "The 'significant benefit' required by Code of Civil Procedure section 1021.5 need not be tangible or concrete but may be recognized from

the effectuation of a fundamental policy. [Citation.] The trial court determines the significance of the benefit, and the group receiving it, ‘from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case. [Citation.]’ [Citation.] The courts are not required to narrowly construe the significant benefit factor. ‘The “extent of the public benefit need not be great to justify an attorney fee[s] award.” [Citation.]’ [Citation.] And fees may not be denied merely because the primary effect of the litigation was to benefit the individual rather than the public.’ (Indio Police Command Unit Assn. v. City of Indio (2014) 230 Cal.App.4th 521, 543.)

We review the trial court’s decision to award attorneys’ fees under Code of Civil Procedure section 1021.5 for an abuse of discretion. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578.)

B. IMPORTANT RIGHT

The County appears to argue that Cullen was not entitled to attorneys’ fees pursuant to Code of Civil Procedure section 1021.5 because the Legislature did not grant a right to non-attorney representation at EMT disciplinary hearings. The validity of the superior court’s ruling that Cullen was entitled to representation of his choosing at the hearing before the ALJ employed by the OAH is not subject to review since the County did not appeal the Writ decision. The County contends that it did not have an opportunity to appeal whether the Writ vindicated an “important right” because the Writ was based on whether Cullen received a fair hearing. The County contends it should be able to argue that the APA does not provide for the right to non-attorney representation at hearings

conducted pursuant to Government Code section 11517 in this appeal, as it is the first opportunity to make this argument. This is legally untenable. The grant of Writ was based solely on whether Cullen was afforded a fair hearing, and the superior court concluded that he was not afforded a fair hearing because he was denied representation of his choosing. The County cannot raise this issue under the guise of claiming that there was no “important right” vindicated. The ruling of the superior court is not reviewable. (See *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 172-173 [court may not review any decision or order from which an appeal could have been taken but was not].)

What is reviewable is whether Cullen’s action “has resulted in the enforcement of an important right affecting the public interest.” (Code of Civ. Proc., § 1021.5.) We assess whether the right vindicated—the right to a non-attorney representative at an EMT disciplinary hearing—affected the public interest, and not whether the finding of that right was proper. Here, the rights of due process at the administrative hearing were clearly an important right in the public interest.

C. INDISPENSABLE PARTY AND SIGNIFICANT BENEFIT

It further appears to this court that the County is arguing that the Legislature selected, though the implementation of the APA, the OAH as the adjudicative body for all EMT disciplinary hearings. As such, the OAH is an indispensable party. Without the joinder of the OAH, Cullen cannot prove a significant benefit to the public at large as required by Code of Civil Procedure section 1021.5 as the OAH would not be subject to this decision. There would be no future benefit to the public at large.

“A necessary party is one ‘(1) in [whose] absence complete relief cannot be accorded among those already parties or (2) [who] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of [those] already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest.’ ”
(*Hayes v. State Dept. of Developmental Services* (2006) 138 Cal.App.4th 1523, 1529 (*Hayes*).)

Health and Safety Code section 1797.184 provides that the agency—here the REMSA—in charge of EMTs shall develop, “Regulations for disciplinary processes for EMT-I and EMT-II applicants and certificate holders that protect the public health and safety. These disciplinary processes shall be in accordance with Chapter 5 (commencing with Section 11500) of Part I of Division 3 of Title 2 of the Government Code.” (Health & Saf. Code, § 1797.184, subd. (d).)

Government Code section 11517 does not mandate that the OAH conduct all hearings on behalf of an agency. Rather, it provides “A contested case may be originally heard by the agency itself and subdivision (b) shall apply. Alternatively, at the discretion of the agency, an administrative law judge may originally hear the case alone and subdivision (c) shall apply.” Subdivision (b) of Government Code section 11517 provides in pertinent part that “An administrative law judge shall be present during the consideration of the case and, *if requested*, shall assist and advise the agency in the conduct of the hearing.”

“When the administrative law judge hears the contested case alone, he or she must deliver a proposed decision to the relevant agency, . . . ([Govt. Code,] § 11517, subd. (c).) If the [agency] fails to take action within 100 days of receipt of the proposed decision, it is deemed adopted as the final decision of the [agency]. (§ 11517, subd. (c)(2).) Upon receipt of the proposed decision, the [agency] has several alternative courses of action available. It may: (A) adopt the proposed decision in its entirety; (B) reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision; (C) make technical or other minor changes in the proposed decision and adopt it as the decision; (D) reject the proposed decision and refer the case to the same administrative law judge if reasonably available; or (E) ‘[r]eject the proposed decision, and decide the case upon the record, including the transcript, or upon an agreed statement of the parties, with or without taking additional evidence.’ (§ 11517, subd. (c)(2).)” (*Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 303-304.) “There is no language in section 11517 prohibiting its application to matters decided on remand following judicial review by writ of administrative mandate.” (*Id.* at p. 312.)

Based on the foregoing rules, the County here had significant control over the hearing process, and the decision in *Hayes, supra*, 138 Cal.App.4th 1523 is applicable. In that case, “Ryan Hayes, by and through his guardian ad litem, filed a petition for peremptory writ of administrative mandamus [citation] challenging the decision of an administrative law judge (ALJ) provided by the Department of General Services, Office of Administrative Hearings (OAH). The decision affirmed the termination of funding for the educational portion of Hayes’s ‘In–Home Discrete Trial Program.’ In his writ

petition, Hayes named as a respondent the State Department of Developmental Services (the Department), the agency which contracted with OAH to provide the ALJ. [Citation.] The trial court dismissed the petition because Hayes failed to join OAH as a party before the 90-day statute of limitations had expired, reasoning that ‘effective relief’ could not be granted in the absence of OAH.” (*Id.* at p. 1527.) The lower court concluded that the decision was made by the ALJ and the Department. The petition for writ of mandate had to be directed at the “ ‘decision-maker,’ ” which was the ALJ and not the Department. (*Id.* at p. 1528.)

On appeal, Hayes argued that OAH was not an indispensable party because the OAH acted as a neutral tribunal and had no discernible interest in the outcome of the proceedings. (*Hayes, supra*, 138 Cal.App.4th at p. 1528.) The appellate court agreed. It first noted that the Department was responsible for contracting for independent hearing officers pursuant to Welfare and Institutions Code section 4712, subdivision (b). (*Id.* at p. 1530.) It found, “Had the [superior] court granted Hayes’s writ, it would have directed ‘respondent[s]—in this case the Department and its director—to set aside the decision issued by the ALJ from OAH. [Citation.] Given the statutory and contractual relationship between the Department and OAH, there is no bar to the Department and its director setting aside the decision made by their representative. If the basis for the trial court’s ruling were procedural defects in the manner the hearing was held, the Department and its director could direct OAH as their representative to hold another fair hearing free of those procedural defects. If the basis for the trial court’s ruling were a finding that the ALJ’s decision was an abuse of discretion, the Department and its

director could direct OAH as its representative to enter a new and different decision consistent with the trial court's ruling. . . . Therefore, Hayes can be accorded complete relief among those who are already parties without the need to join OAH.” (*Id.* at p. 1532, fn. omitted.)

While the County here did not “contract” with the OAH to conduct its hearings, it had full control over the hearings. It could choose to conduct the hearing on its own with the assistance of the ALJ. (Govt. Code, § 11517, subds. (a) & (b)(1).) The County could conduct the hearing pursuant to any rules as there are no directives in that section as to the applicable rules. Further, if the County chose to have the hearing in front of an ALJ, it could reject any decision made by the ALJ and direct the ALJ to take additional evidence. (Govt. Code, § (c)(1)(D).) Moreover, there is nothing in that section that provides the hearing must be conducted pursuant to OAH rules or that the County had no authority to advise the ALJ to follow certain procedures during the hearing. Nor does the County point this Court to any rule. As in *Hayes*, the OAH was the designee of the County to conduct hearings. The County had the authority to request a new hearing under whatever procedure chosen or could direct the ALJ to assist it in a hearing conducted pursuant to the superior court's ruling.

While the County has been directed by the APA to conduct its hearings in the OAH, REMSA retains the right to reject the findings of the ALJ and nothing in Government Code section 11517 restricts the authority of the County. The OAH was not an indispensable party. It had no interest in the outcome of the case. Furthermore, the County, after the superior court's ruling, could direct that all hearings in the future allow

for representation by a non-lawyer, a significant benefit to those facing loss of their EMT certification or other license holders. The County provides no further argument that the calculation of the fee was improper or excessive. As such, we affirm the award of attorneys' fees in the amount of \$30,762.50.

DISPOSITION

We affirm the award of attorneys' fees and costs to Cullen. Costs of the appeal are awarded to Cullen as the prevailing party.

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MILLER

J.

We concur:

RAMIREZ

P. J.

CODRINGTON

J.